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No. 08-849

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IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND A. KIGHT, et al.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

REPLY BRIEF FOR THE PETITIONERS

LEON RODRIGUEZ
County Attorney for
Montgomery
County, Maryland

PATRICIA P. VIA
EDWARD B. LATTNER
101 Monroe Street
Third Floor
Rockville, MD 20850
(240) 777-6700

Counsel for County Petitioners

DOUGLAS F. GANSLER
Attorney General of
Maryland

AUSTIN C. SCHLICK
STEVEN M. SULLIVAN
KATHLEEN E. WHERTHEY*
Office of the Attorney
General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6324

Counsel for State Petitioners

** Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

THIS CASE IS A SUITABLE VEHICLE FOR PROVIDING GUIDANCE TO STATE AND SUBORDINATE FEDERAL COURTS ON THE PROPER INTERPRETATION AND APPLICATION OF 28 U.S.C. § 1367(d) 1

A. This Case Is a Suitable Vehicle for Determining the Meaning of "Pending" in 28 U.S.C. § 1367(d) 4

B. This Case Is a Suitable Vehicle for Determining the Meaning of "Tolled" in 28 U.S.C. § 1367(d) 9

C. There Is No Superior Vehicle For Deciding The Important Questions This Case Presents 10

CONCLUSION 12

APPENDIX ..... App. 1

Order of the Supreme Court of Minnesota, *Goodman v. Best Buy, Inc.*, No. A07-1820 (Feb. 4, 2009) ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Berke v. Buckley Broad. Corp., 821 A.2d 118 (N.J. Super. Ct. App. Div.), *cert. denied*, 832 A.2d 322 (N.J. 2003) 5

Clark v. Velsicol Chem. Corp., 431 S.E.2d 227 (N.C. Ct. App. 1993), *aff'd*, 444 S.E.2d 223 (N.C. 1994) (per curiam) 4-5

Dolan v. United States Postal Serv., 546 U.S. 481 (2006) 7

Estate of Fennell ex rel. Fennell v. Stephenson, 528 S.E.2d 911 (N.C. Ct. App. 2000), *rev'd in part on other grounds*, 554 S.E.2d 629 (N.C. 2001) 6

Garner v. Archers Glen Partners, Inc., 405 Md. 43 (2008) 9

Goodman v. Best Buy, Inc., 755 N.W.2d 354 (Minn. Ct. App. 2008) 10-11

Harter v. Vernon, 532 S.E.2d 836 (N.C. Ct. App.), *appeal dismissed and review denied*, 546 S.E.2d 97 (N.C. 2000), *cert. denied*, 532 U.S. 1022 (2001) 5

Huang v. Ziko, 511 S.E.2d 305, 307 (N.C. Ct. App. 1999) 5hu

Kendrick v. City of Eureka, 98 Cal. Rptr. 2d 153 (Cal. Ct. App. 2000) ... 4-5

Lucas v. Muro Pharms., 1994 WL 878820 (Mass. Super. Ct. 1994) 6

Okoro v. City of Oakland, 48 Cal. Rptr. 3d 260 (Cal. Ct. App. 2006) 5

Sydnor v. State, 365 Md. 205 (2001) 9

STATUTES AND RULES:

United States Code Annotated

28 U.S.C. § 1367 . . . . . 2, 8

28 U.S.C. § 1367(a) 7

28 U.S.C. § 1367(d) . . . . . *passim*

Supreme Court Rules

S. Ct. R. 13.3 6

Federal Rules of Appellate Procedure

Fed. R. App. P. 35(a) 6

Fed. R. App. P. 35(c) 6

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THIS CASE IS A SUITABLE VEHICLE FOR PROVIDING GUIDANCE TO STATE AND SUBORDINATE FEDERAL COURTS ON THE PROPER INTERPRETATION AND APPLICATION OF 28 U.S.C. § 1367(d).

The petition for a writ of certiorari showed, and Respondent agrees, that this case involves two distinct, unresolved questions of federal law: the meanings of both "pending" and "tolled" as those terms are used in 28 U.S.C. § 1367(d). Respondent's contention that this case squarely presents only the first issue rather than both issues, and that the Court should await some future case to resolve inarguable uncertainty and

conflict in the lower courts (Br. in Opp'n at 6, 16), is mistaken.

Since Congress's enactment of 28 U.S.C. § 1367, the ambiguity of the two emphasized words has bedeviled courts:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be *tolled* while the claim is *pending* and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (emphasis added).

Interpretation of both "tolled" and "pending," as used in 28 U.S.C. § 1367(d), is essential to resolution of this case, given its procedural history. The key events are summarized below:

Date	Event
04/21/00	Alleged mistreatment of Respondent
05/15/01	Respondent files complaint in federal district court asserting state and federal claims
03/26/02	Federal district court rules for Petitioners on all federal claims and declines to exercise supplemental jurisdiction over state law claims

04/05/02	Respondent moves for reconsideration of her federal, but not her state, claims
08/07/02	Federal district court grants reconsideration of one federal count against one Petitioner
04/21/03	Three-year state limitations period expires
08/20/03	Federal district court grants summary judgment for Petitioners on last federal count
09/02/03	Respondent moves for reconsideration of summary judgment on last federal count
12/22/03	Reconsideration of summary judgment on last federal count denied
01/15/04	Respondent appeals to the Fourth Circuit concerning only her federal claims
01/07/05	Fourth Circuit panel affirms dismissal of federal claims
01/21/05	Respondent petitions for rehearing en banc
03/08/05	Rehearing en banc denied
03/11/05	Respondent files a complaint reasserting her state claims in state court

A. This Case Is a Suitable Vehicle for Determining the Meaning of "Pending" in 28 U.S.C. § 1367(d).

As Respondent emphasizes (Br. in Opp'n at 7-8), deciding whether she timely refiled her state claims in March 2005, nearly two years after the state limitations period expired, requires a determination of how long her state law claims remained "pending" for purposes of 28 U.S.C. § 1367(d). Respondent acknowledges that the commentary to § 1367(d) in the United States Code Annotated "recognizes that the term 'pending' has not been definitively construed." (Br. in Opp'n at 13 n.3.) Respondent nevertheless contends that the meaning of "pending" needs no further clarification in this context. (*Id.* at 8-9.)

Respondent wrongly asserts that "every court that has ruled on the issue has interpreted 'pending' to include the *entire* federal appellate process." (*Id.* at 9 (emphasis added).) On the contrary, all of the courts that have addressed whether the "pending" period under 28 U.S.C. § 1367(d) includes the duration of discretionary federal appeals have excluded the period of those appeals from the period a claim remains "pending." *See, e.g., Kendrick v. City of Eureka*, 98 Cal. Rptr. 2d 153, 154, 157 (Cal. Ct. App. 2000) ("[S]ection 1367(d) continues to toll the state statute of limitations during the federal appeal period provided as a matter of statutory right, but tolling ceases once the district court decision is affirmed by the federal appellate court" and does not continue through subsequent request for "completely discretionary" review); *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227,

229-30 (N.C. Ct. App. 1993) (holding that because a petition for writ of certiorari to this Court "is not an appeal of right, and no review is guaranteed once the petition is filed," a case is no longer pending for tolling purposes while decision on the discretionary petition is pending), *aff'd*, 444 S.E.2d 223 (N.C. 1994) (per curiam); *see also Huang v. Ziko*, 511 S.E.2d 305, 307 (N.C. Ct. App. 1999) (same, following *Clark*).

The authorities upon which Petitioner relies for her assertion that a case remains "pending" for purposes of 28 U.S.C. § 1367(d) throughout the entire federal appellate process do not, in fact, support that proposition. All are consistent with either the better view that a case ceases to be "pending" when it is dismissed by the federal district court, or the view that "pending" status ceases at the stage of discretionary appellate review. *See Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006) (adopting *Kendrick's* "well-reasoned" view that "a matter remains 'pending' in the federal court system, at least arguably through appeal to the courts of appeals afforded as a matter of statutory right") (quoting *Kendrick*, 98 Cal. Rptr. 2d at 157); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div.) (holding that § 1367(d)'s tolling effect lasts until "thirty days following the judgment of the [district] court declining to exercise supplemental jurisdiction," and declining to decide whether case refiled within 30 days after federal appellate court's decision would have been timely), *cert. denied*, 832 A.2d 322 (N.J. 2003); *see also Harter v. Vernon*, 532 S.E.2d 836, 839 (N.C. Ct. App.) (not addressing periods beyond federal appeal as of right), *appeal dismissed and review denied*, 546

S.E.2d 97 (N.C. 2000), *cert. denied*, 532 U.S. 1022 (2001); *Estate of Fennell ex rel. Fennell v. Stephenson*, 528 S.E.2d 911, 914 (N.C. Ct. App. 2000) (same), *rev'd in part on other grounds*, 554 S.E.2d 629 (N.C. 2001); *Lucas v. Muro Pharms.*, 1994 WL 878820 at *1-*3 (Mass. Super. Ct. 1994) (same).

In this case, Respondent's federal appeal, including her petition for rehearing en banc by the Fourth Circuit, cannot serve to prolong the tolling period for her state claims under 28 U.S.C. § 1367(d), for several reasons. First, Respondent's state claims had been finally dismissed by the district court and her federal appeal concerned only her federal claims; for that reason alone, her state claims no longer were "pending" for purposes of 28 U.S.C. § 1367(d). Furthermore, even if Respondent's state claims were deemed to remain pending during the Fourth Circuit panel's proceeding on the federal claims, the state claims would have ceased to be "pending" for tolling purposes on the date when Respondent's appeal of right was decided, before Respondent sought further discretionary review by means of a petition for rehearing en banc. *See* Fed. R. App. P. 35(a), (f) (establishing discretionary nature of petition for en banc determination); *see also* Pet. for Writ of Cert. at 14.

The last date Respondent's state claims could have been "pending" was January 7, 2005, the date the Fourth Circuit panel affirmed the district court's judgment. *See* Fed. R. App. P. 40(a)(1) (requiring filing of petition for rehearing en banc "within 14 days after entry of judgment"); S. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of

entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate . . . ."). Respondent did not refile her state claims in state court until March 11, 2005, approximately 36 months after the district court's dismissal of her state claims and 63 days after the Fourth Circuit's panel decision on the merits of her federal appeal. Accordingly, that refiling was untimely, under even the most liberal interpretation courts have afforded the term "pending" in § 1367(d).

Respondent relies in error upon two dictionary definitions of the word "pending," and certain legislative history of 28 U.S.C. § 1367(d). (*See* Br. in Opp'n at 10-13.) From those bare definitions, and from the drafters' removal of the words "in the district court" following "pending" in the final version of the statute, Respondent infers that, when enacting § 1367(d), Congress enlarged the meaning of "pending" in order to include any and all proceedings before federal appellate courts.

Respondent's inference is unwarranted, because "[i]nterpretation of a word or phrase depends upon reading the whole statutory text." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). Section 1367(d) establishes a tolling rule for claims asserted under § 1367(a) that have been dismissed. Section 1367(a) concerns only the jurisdiction of the district courts. Thus, in every case, the dismissal of a claim triggering operation of § 1367(d) must be by a district court. Repeating that requirement in § 1367(d) would have been surplusage. Therefore, the drafters' removal

of the phrase "in the district court" from § 1367(d) merely eliminated surplus verbiage.

Respondent's final, policy-based argument for an expansive interpretation of "pending" in 28 U.S.C. § 1367 is similarly unpersuasive. Respondent argues that it is inefficient to require a plaintiff to refile her state claims in state court while federal appellate proceedings may be ongoing. (*See* Br. in Opp'n at 13-15.) However, there must come a point during prosecution of a federal action when the equities require a plaintiff's interest in preserving her state claims during the federal action to yield to the interests of defendants and the states themselves in timely resolution of those claims. The commentary to the United States Code Annotated addresses that balance, and defines that point, as follows:

> The dismissal moment should be taken to be the moment of dismissal in the district court. Even if an appeal is taken to a court of appeals from the district court dismissal, the party whose claim has been dismissed under § 1367 does best to commence the state action within the prescribed time measured from the district court dismissal, and not from some later appellate affirmance of it. Perhaps, after commencing the state court action in such a situation, the plaintiff can ask the state court to stay the action – now timely commenced and pending – while the federal appeal proceeds.

(App. 50). Petitioner's disagreement with this recommended approach only highlights the need for a definitive federal ruling.

B. This Case Is a Suitable Vehicle for Determining the Meaning of "Tolled" in 28 U.S.C. § 1367(d).

For the reasons just stated, it is highly likely that, in deciding this case, this Court would resolve the correct interpretation of both "pending" and "tolled," as those terms are used in 28 U.S.C. § 1367(d). Significantly, although the intermediate and highest Maryland appellate courts issued opposite judgments in this case, both of those courts deemed it necessary to decide both statutory questions. (App. 10-30, 39-51.) There is no reason to think that the Maryland courts reached out to decide any issue unnecessarily, as it is not their general practice to do so. *See, e.g., Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008) ("[W]e decline Petitioner's invitation to address the issue of standing where unnecessary to do so in order to decide the outcome of the case."); *see also Sydnor v. State*, 365 Md. 205, 222 (2001) (Raker, J., concurring in result) (referencing "the well-known tenet that appellate courts should not decide issues unnecessarily").

Respondent advocates a construction of the term "tolled" in 28 U.S.C. § 1367(d) that is contrary to reason and the canons of statutory construction, contrary to the statute's legislative history and purpose, and also contrary to principles of federalism. (*See* Pet. for Writ of Cert. at 16-22; Br. of N.C., et al. as *Amici Curiae* in Support of Pet'rs. at 8-13; *see also*

App. 37-51.) Respondent's refiling of her state claims in state court could be considered timely only if "tolled" in § 1367(d) meant "suspended," such that the state limitations period ceased to run altogether, from the filing of her federal suit on May 15, 2001 through the denial of reconsideration en banc by the Fourth Circuit on March 8, 2005. As shown in the petition (at 10-13), that reading of "tolled" embraces the minority view among the sharply divided state courts, and has been rejected by every federal appellate court that has considered the question. This Court should grant the petition in this case to interpret "tolling" definitively.

C. There Is No Superior Vehicle For Deciding The Important Questions This Case Presents.

Respondent recommends that this Court forego the present opportunity to provide guidance on the meaning of both "pending" and "tolled" in 28 U.S.C. § 1367(d), because "surely a case cleanly presenting" the issue of what "tolled" means "will soon come before this Court." (Br. in Opp'n at 16). Respondent names, in particular, *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354 (Minn. Ct. App. 2008), as a candidate for this Court's consideration. The Supreme Court of Minnesota, before which *Goodman* currently is pending, has stayed that case pending the outcome of the petition for a writ of certiorari in this case. (App., *infra*, at 1-2.) Whereas Respondent argues that this Court should await resolution of *Goodman*, *Goodman* itself awaits resolution of the present case.

If this Court were to deny certiorari in the present case, there is no certainty that *Goodman* ever would

reach this Court, or, even if it did, that it would present a better vehicle for interpreting 28 U.S.C. § 1367(d). The parties in *Goodman* may settle their dispute before the Supreme Court of Minnesota decides it. Even if the Supreme Court of Minnesota ultimately does decide the case, there is nothing to prevent that Court from resting its decision upon the independent question of state common law that the case also poses. (*See* 2007 WL 5581628 (*Goodman* Appellant's Br. & App.); 2007 WL 5581629 (*Goodman* Br. of Respondent); 2007 WL 5581630 (*Goodman* Appellant's Reply Br. & App.).) Furthermore, even if the Supreme Court of Minnesota were to decide *Goodman* upon the basis of § 1367(d), the decision likely would address the meaning only of "tolled," not "pending" (*see id.*; *see also* Br. in Opp'n at 16).

Respondent's argument that the Court "surely" will see other petitions involving § 1367(d), even if it were to prove correct, only highlights that the questions presented in this petition are recurring. This case offers a timely and suitable vehicle for resolving the split of authority on the proper application of 28 U.S.C. § 1367(d). Their timely resolution is a matter of considerable importance to the states, as evidenced by the participation of 18 states as amici in support of the petition in this case. Accordingly, this Court should avail itself of the opportunity this case presents to issue definitive guidance on the interpretation of § 1367(d) in its entirety.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

LEON RODRIGUEZ
County Attorney for Montgomery County, Maryland

PATRICIA P. VIA
EDWARD B. LATTNER
101 Monroe Street
Third Floor
Rockville, MD 20850
(240) 777-6700

Counsel for County Petitioners

DOUGLAS F. GANSLER
Attorney General of Maryland

AUSTIN C. SCHLICK
STEVEN M. SULLIVAN
KATHLEEN E. WHERTHEY*
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6324

Counsel for State Petitioners

** Counsel of Record*

App. 1

STATE OF MINNESOTA

IN SUPREME COURT

A07-1820

Jonathon L. Goodman,

Respondent,

vs.

Best Buy, Inc.,

Appellant.

ORDER

Respondent Jonathon L. Goodman has filed a motion to stay proceedings in the above-entitled case pending the United States Supreme Court's resolution of a petition for a writ of certiorari in *Turner v. Kight*, 957 A.2d 984 (Md. 2008), *petition for cert. filed*, 77 U.S.L.W. 3412 (U.S. Jan. 5, 2009) (No. 08-849). Appellant Best Buy, Inc., does not oppose respondent's motion. On January 15, 2009, this court ordered the briefing deadlines in this case stayed pending a decision on respondent's motion.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that all proceedings in this court be, and the same are, stayed pending a decision by the Supreme Court on the petition for a

writ of certiorari in *Kight v. Turner,* No. 08-849 (U.S.). Respondent shall notify the court and counsel for appellant and amici curiae of the decision by The Supreme Court on the petition for a writ of certiorari within 10 days of the decision.

Dated: February 4, 2009

BY THE COURT:

/s/
Eric J. Magnuson
Chief Justice

PAGE, J., took no part in the consideration or decision of this matter.